

CITATION: Bokhari v. Top Medical Transportation Services, 2025 ONSC 1208
DIVISIONAL COURT FILE NO.: 160/24
DATE: 20250310

**SUPERIOR COURT OF JUSTICE – ONTARIO
DIVISIONAL COURT**

RE: ALI BOKHARI, Applicant

AND:

TOP MEDICAL TRANSPORTATION SERVICES AND HUMAN RIGHTS
TRIBUNAL OF ONTARIO, Respondents

BEFORE: Matheson J.

COUNSEL: *Nabila F. Qureshi, Richa Oza, Anna Rosenbluth*, for the Applicant

Aaron Rosenberg, for the Respondent Top Medical Transportation Services¹

Morgana Kellythorne and Mindy Noble, for the Human Rights Tribunal of Ontario

HEARD at Toronto: February 24, 2025, by video-conference

ENDORSEMENT

[1] There are two motions before me, both of which relate to the record for this application for judicial review. The application itself challenges the Human Rights Tribunal of Ontario (the HRTO or Tribunal) decision dated December 5, 2022, dismissing the application to the HRTO after a written hearing (the Decision), and the HRTO decision dated February 15, 2024, dismissing the request for reconsideration (the Reconsideration Decision).

[2] The applicant alleged discrimination with respect to employment because of disability. He submitted that his employer discriminated against him by terminating his employment when he asked for two weeks off due to an ankle injury. The Tribunal found that there was not a basis to conclude that the injury gave rise to a disability under the *Human Rights Code*, R.S.O. 1990, c. H.19, and, therefore, the HRTO had no jurisdiction.

[3] The applicant is seeking to supplement the record of proceedings delivered by the HRTO or, alternatively, supplement his own application record with internal documents from the HTRO.

¹ The respondent Top Medical Transportation Services attended the hearing but took no position on the motions.

The applicant served three summonses to witness to obtain that internal information, seeking evidence from two former Associate Chairs of the Tribunal and its Registrar. The first motion before me is the motion to quash the summonses. The second motion before me is a motion to strike out part of an affidavit that the applicant delivered in response to the motion to quash the summonses.

[4] The applicant intends to raise numerous issues in his application for judicial review. For all but one of those issues, the applicant already has the record that he needs. Those issues are centered on the core reason that his application to the HRTO was dismissed – the finding that his ankle injury was a transitory condition, not a disability. The applicant plans to challenge the process followed because it did not provide him with an oral hearing or the opportunity to call witnesses. He also plans to submit that the Adjudicator’s use of the balance of probabilities standard was unreasonable and that he did not have sufficient notice of it. None of these grounds require the information sought in the summonses to witness.

[5] The summonses to witness are predicated on an assumption, or speculation, that the sought-after internal documents will show something different than the Tribunal practice as set out in an HRTO Practice Direction and shown in HRTO decisions on CanLII.

[6] In December 2022, the HRTO released a Practice Direction indicating that starting in January 2021, the Tribunal determined jurisdictional issues on a balance of probabilities, rather than the ‘plain and obvious’ standard. The Practice Direction noted that this was not a rule, and the Tribunal could vary its approach when appropriate. The Practice Direction was released through what the HRTO calls an Operational Update, which is a brief online alert with a link to the Practice Direction. The Operational Update called the above a ‘protocol’.

[7] In addition to the above Practice Direction, it was discernible from HRTO decisions, which are publicly available on CanLII, that since 2021 some adjudicators were using the balance of probabilities standard, and others used the plain and obvious standard. The non-mandatory nature of the standard described in the Practice Direction was apparent in that period. After the release of the Practice Direction both standards continued to be used.

[8] There is no issue that a tribunal may have a tribunal-wide policy or practice provided that it does not compel or induce decision-makers to decide against their own conscience or opinion: *Iwa v. Consolidated-Bathurst Packaging Ltd.*, [1990] 1 S.C.R. 282, at pp. 327-328, 332-333. Tribunal-wide policies encourage uniformity and advance the important benefits of experience: *Consolidated-Bathurst*, at p. 327. Discussions between colleagues do not constitute, in and of themselves, infringements on an adjudicator’s capacity to decide the issues independently: *Consolidated-Bathurst*, at p. 333.

[9] The above practice at the HRTO, as described in the Practice Direction, is in accordance with the principles in *Consolidated-Bathurst*. Although a Tribunal practice, it is not mandatory on its face, which is also shown by the HRTO decisions released after the practice began.

[10] Despite the above, the applicant submits that the HRTO may have also had an internal protocol before December 2022, when his application was being considered, which required the

use of the balance of probabilities standard and therefore fettered the Adjudicator's discretion. Through the summonses, the applicant seeks a broad array of internal documents described as comprising or referencing that internal protocol. He does so despite having the non-mandatory HRTO Practice Direction, having confirmation from the Adjudicator who made the Decision that she followed the practice shown in the Practice Direction, and despite being advised that there is no such internal protocol.

[11] In response to the HRTO motion to quash the summonses, the applicant delivered an affidavit of a former adjudicator, Mark Hart. This gave rise to the second HRTO motion, to strike out part of that affidavit as protected by confidentiality or deliberative secrecy and because the affidavit included purported evidence of domestic law.

[12] As set out below, I grant the motion to quash the summonses and strike out most, but not all, the impugned paragraphs in Mr. Hart's affidavit.

HRTO Decisions at Issue on Application for Judicial Review

[13] The applicant brought his HRTO application in February 2021. In response, the Tribunal gave notice of an intent to dismiss because it appeared that the application did not identify any specific acts of discrimination that fell within the *Code*. Therefore, the application to the HRTO appeared to be outside the Tribunal's jurisdiction.

[14] The applicant made written submissions in response to the notice. As set out in the Decision, the Adjudicator considered those submissions, finding no connection between what the applicant saw as an unfair termination and the grounds of discrimination under the *Code*. The Adjudicator expressly considered the applicant's position that his ankle injury was a disability and that he should have been accommodated.

[15] As set out in the Decision, the Adjudicator accepted that a *Code*-protected disability could result from an injury. The Adjudicator discussed prior HRTO decisions that considered the question of whether an injury is a transitory condition or gives rise to a disability, including decisions about ankle injuries. Those cases supported the principle that transitory ailments were not necessarily disabilities under the *Code*. Based on the facts asserted by the applicant, the Adjudicator held that there was not a basis to conclude that the ankle injury was so serious that it resulted in substantial ongoing limits on the applicant's activities or that the applicant could not perform his job for a significant period of time. The application was dismissed.

[16] The applicant requested reconsideration and put forward numerous grounds in support of that request. Among other things, he challenged the HRTO case law about transitory conditions and disability. He also submitted and relied on the Tribunal's December 2022 Practice Direction and the related Operational Update from the Tribunal's website.

[17] On reconsideration, the Adjudicator concluded that the applicant had still shown no connection between the facts of his claim and a *Code* violation. The Adjudicator again accepted that an injury could result in a disability but, having considered the applicant's further submissions, it was not shown in his case.

[18] The applicant submitted that the Adjudicator should have used the plain and obvious standard when reaching the Decision. The applicant also submitted that he should have had, and did not, receive notice of the change regarding the use of the balance of probabilities standard. The applicant submitted and relied on the December 2022 Practice Direction and Operational Update. The applicant did not submit that there may have been a different internal protocol giving rise to the Decision that fettered the Adjudicator’s discretion. The Adjudicator confirmed that she followed the protocol shown in the December 2022 Practice Direction. The Adjudicator confirmed that she did not apply the plain and obvious test. She disagreed that this issue was a basis for reconsideration.

[19] The applicant then sought judicial review, submitting that both Decisions were unreasonable and unfairly reached. The applicant again challenged the discrimination analysis regarding the ankle injury, submitting that the Tribunal departed from established jurisprudence on the test for discrimination. He also submitted that it was unfair to use the balance of probabilities standard of proof without first informing the parties.

[20] In the notice of application for judicial review, the applicant alleged that there was an unpublished January 2021 protocol that the Adjudicator relied on to reach her Decisions. Applicant’s counsel requested that it be added to the record of proceedings. In response, counsel to the Tribunal confirmed that there was no such protocol.

[21] The applicant also made an access request under the *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, seeking a “copy of the protocol provided to adjudicators in or about January 2021, that is referenced in the HRTO’s Operational Bulletin and Practice Direction, both issued on December 16, 2022 [followed by a quote from the Practice Direction]”. The response to the access request confirmed that, after a search of the Tribunal’s records, there were no such documents.

[22] Despite the above, the applicant seeks an order that the record of proceedings include the document(s) or record of communications that comprise the new protocol implemented in January 2021. The summonses seek the production of documents on the examination of the three witnesses.

Analysis of Issues on Motions

[23] The applicant may summons witnesses on a pending motion under r. 39.03 of the *Rules of Civil Procedure*. There is a *prima facie* right to do so, however, there are limits. First, these examinations are limited to seeking evidence within the witness’ direct personal knowledge: *Magnotta Winery Corporation v. Ontario (The Alcohol and Gaming Commission)*, 2020 ONSC 561, at para. 52. It is not an examination for discovery. In oral submissions, the applicant’s counsel submitted that the Registrar would not have personal knowledge of the matters within the summonses. On that basis, that summons is quashed.

[24] An opposing party “may move to quash a summons to examine a witness on the grounds that the evidence sought is not relevant to the application or that the examination or the underlying

proceeding would amount to an abuse of process”: *Airport Taxicab (Pearson Airport) Association v. Toronto (City)*, 2009 CanLII 25973 (ON SC), at para. 27.

[25] The “onus is on the party seeking to conduct the examination to show on a reasonable evidentiary basis that the examination would be conducted on issues relevant to the pending application and that the proposed witness was in a position to offer relevant evidence”: *Ontario Federation of Anglers & Hunters v. Ontario (Ministry of Natural Resources)*, (2002), 211 D.L.R. (4th) 741 (Ont. C.A.), at para. 30.

[26] If the party seeking the examination cannot satisfy the relevancy and evidentiary screening, then the summons is regarded as a “fishing expedition and an abuse of process” and not permitted: *Airport Taxicab (Pearson Airport) Association*, at para. 28.

[27] Here, the HRTO submits that the applicant cannot meet the threshold, which requires a reasonable evidentiary basis, and that to the extent that the documents sought are protected by deliberative secrecy or confidentiality, the summonses are an abuse of process.

[28] The applicant relies on the affidavit of Mr. Hart to show the relevance and a reasonable evidentiary basis. Part of that affidavit is the subject of the motion to strike. I will therefore address that motion before returning to the threshold the applicant must meet for the summonses.

[29] Mr. Hart was a Vice-Chair of the HRTO prior to the time period relevant to this case. He was a Vice-Chair from 2007 to 2019, except that for one year during that period he was acting co-Associate Chair. His time at the HRTO ended in August 2019, well before the applicant’s HRTO proceedings, which began in 2021.

[30] This is unlike *Payne v. Ontario (Human Rights Commission)* (2000), 192 D.L.R. (4th) 315 (Ont. C.A.), where Ms. Payne put forward an affidavit from a commissioner who was at the HRTO at the time Ms. Payne’s complaint was considered. Further, in *Payne* the Commission did not object to the admissibility of that affidavit.

[31] Mr. Hart has been put forward as a fact witness. In his affidavit, Mr. Hart attests to things he did or observed while at the HRTO and prior to that time. He attests to more recent public reports that he has read. He also attests to changes that were underway when his time at the HRTO ended in 2019 and a phone call that he received from an adjudicator in 2022. The phone call was not about the use of the balance of probabilities standard. Mr. Hart was not involved in the 2022 Practice Direction or any related steps. He was not at the HRTO.

[32] However, based on his earlier experience, Mr. Hart gives his opinion about how he believes the 2021 change in practice was done internally at the HRTO and by whom. This is the first problem with his affidavit. He is not put forward as an expert and, as a fact witness, cannot attest to events that he was not a witness to after 2019. As well, in his affidavit he notes that there were changes underway when he left. Yet he assumes that his prior experience applies. He also makes assumptions that are not proven about what might have been the reason for the 2021 change in practice. He does not purport to put forward information and belief from someone who was a

witness at the relevant time. Given these issues, the affidavit is deserving of little weight in any event.

[33] In addition, the HRTO submits that Mr. Hart's affidavit includes evidence that is improper. Starting with paras. 26, 44 to 47, the HRTO submits that these paragraphs are purported evidence about domestic law, and therefore inadmissible. I agree. The applicant submits that these paragraphs, discussing HRTO decisions before and during 2021, form part of the foundation for Mr. Hart's opinions about how and why the change was made in 2021. They are not admissible on that basis and are properly struck out. In any event, considering those paragraphs would not change the outcome of these motions.

[34] Next, the HRTO submits that Mr. Hart's affidavit contains paragraphs or parts of paragraphs that are improper because they are protected by deliberative secrecy and by Mr. Hart's confidentiality obligations. Mr. Hart talks about his and other adjudicators' activities regarding the development of Tribunal processes and case management while he was at the Tribunal. He discusses how the use of the plain and obvious standard was developed, the development of Tribunal rules and procedures and internal communications, among other things. I will not elaborate on the challenged portions of the affidavit here because I conclude that they are protected by deliberative secrecy and properly struck out. The only exceptions are the challenged portions of paras. 1 and 34 of the affidavit, which are not materially different in nature from the job descriptions put forward by the HRTO.

[35] Deliberative secrecy protects the decision-making process. It is a core component of judicial independence: *Commission scolaire de Laval v. Syndicat de l'enseignement de la région de Laval*, 2016 SCC 8, [2016] 1 S.C.R. 29, at para. 57

[36] Although the principle of deliberative secrecy does not apply as strongly to administrative tribunals as to courts, the Supreme Court of Canada has confirmed that deliberative secrecy is the general rule for administrative tribunals: *Summitt Energy Management Inc. v. Ontario Energy Board*, 2012 ONSC 2753 (Div. Ct.), at para. 80; *Grogan v. Ontario College of Teachers*, 2023 ONSC 2980 (Div. Ct.), at para. 16.

[37] Under "the rule of deliberative secrecy, members of administrative tribunals generally cannot be required to testify about how or why they reach their decisions": *Summitt Energy*, at para. 80.

[38] Deliberative secrecy "also favours administrative consistency by granting protection to a consultative process that involves interaction between the adjudicators who have heard the case and the members who have not, within the rules set down in [*Consolidated-Bathurst*]. Without such protection, there could be a chilling effect on institutional consultations, thereby depriving administrative tribunals of a critically important means of achieving consistency": *Ellis-Don Ltd. v. Ontario (Labour Relations Board)*, 2001 SCC 4, [2001] 1 S.C.R. 221, at para. 53.

[39] Deliberative secrecy extends to internal communications and the administrative aspects of the decision-making process: *Summitt Energy*, at para. 79; *Chestacow v. British Columbia (Workers' Compensation Appeal Tribunal)*, 2023 BCCA 389, at paras. 33-34. However, the

secrecy of the administrative decision-making is not absolute and will yield where there is an evidentiary basis to allege that the right of natural justice has been infringed: *Tremblay v. Québec (Commission des affaires sociales)*, [1992] 1 S.C.R. 952; *Payne*, at para. 168; *Chestacow*, at para. 34.

[40] The secrecy can be lifted if a litigant can show a “clearly articulated and objectively reasonable concern that a relevant legal right may have been infringed... [I]n view of the importance of the principle of deliberative secrecy in the administrative decision-making process, examinations based on conjecture or mere speculation will not be allowed”: *Payne*, at para. 172.

[41] The applicant has not met this threshold. There is no objectively sound argument before me that the applicant’s rights were infringed such that Mr. Hart should be able to attest to the events at an earlier time period or at all. At its highest, the applicant submits that there may have been a different internal policy that applied to his application and constrained the Adjudicator’s discretion. On the record before me, that is not an objectively sound argument. The applicant further submits that the development of the change in practice to use the balance of probabilities standard does not engage substantive issues even though the standard of proof is a substantive issue.

[42] The applicant’s “onus is not discharged on the basis of speculation, conjecture or simple allegation alone: there must be a foundation before the court for the allegation that not only raises an issue of procedural fairness, but also justifies displacing the privilege in order to adjudicate the procedural fairness issue”: *LifeLabs LP v. Information and Privacy Commr. (Ontario)*, 2022 ONSC 5751 (Div. C.t), at para. 17.

[43] I conclude that the challenged portions of Mr. Hart’s affidavit, except in paras. 1 and 34, are protected by deliberative secrecy and are struck out.

[44] Given my decision above, I need not address an additional ground put forward by the HRTTO in support of the motion to strike out portions of the affidavit, specifically the impact of legislative confidentiality obligations.

[45] I now return to the motion to quash the summonses. As discussed above, to maintain those summonses, the applicant must show a reasonable evidentiary basis that the examinations would be conducted on issues relevant to the pending application and that the proposed witnesses are able to offer relevant evidence. The applicant has not shown a reasonable evidentiary basis that there was a mandatory protocol giving rise to a breach of natural justice. The threshold has not been met.

[46] As discussed above, the summonses are predicated on the assumption that there was an internal Tribunal practice in 2021 that was different from the Practice Direction – different because it was mandatory. There is no reasonable evidentiary basis to conclude that there was such an internal protocol. Counsel to the Tribunal confirmed that there was no such protocol. This was further confirmed through an access to information request. It is also confirmed by a review of the Tribunal decisions that continued to use the plain and obvious standard in the relevant time period. Next, the Adjudicator herself said, in her Reconsideration Decision, that she followed the

protocol in the Practice Direction (which was not mandatory). The applicant already has that document and can rely on it in the application for judicial review.

[47] This conclusion is supported by the concept of proportionality given the context of the main issues on this judicial review, for which the applicant already has the information he needs: *Cunha et. al. v. DaCunha*, 2022 ONSC 930, at para. 35.

[48] Unlike *Payne*, the applicant also has the Adjudicator's substantial reasons for both the Decision and the Reconsideration Decision, including reasons responding to the standard of proof issue that was raised by the applicant on the reconsideration.

[49] There is no unfairness in proceeding with the application for judicial review without the examinations contemplated in the summonses to witness. Just as there is no reasonable basis to conclude that the sought after mandatory protocol exists, there is no reasonable basis to conclude that the proposed witnesses could offer relevant evidence. And although I need not go this far, if there were internal discussions, it appears that they would be protected by deliberative secrecy.

[50] In these circumstances, the summonses are based on speculation and amount to a fishing expedition that may also be an abuse of process.

Disposition of HRTO motions

[51] The motion to quash is granted. The motion to strike out parts of Mr. Hart's affidavit is granted except for the challenged part of paras. 1 and 34. The interim sealing order is amended to remove paras. 1 and 34 and is no longer interim with respect to the portions that have been struck out.

[52] The HRTO may submit a formal order after consultation with the parties. There shall be no order as to costs.

Matheson J.

Date: March 10, 2025